JD-89-19
Chicago, IL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LA TOURAINE LLC d/b/a SOFITEL CHICAGO
MAGNIFICENT MILE

and Case 13–CA–236423

UNITE HERE LOCAL 1

Kevin McCormick, Esq.,
for the General Counsel.
Arch Stokes and *Karl Terrell, Esqs.*,
for the Respondent.

DECISION

GEOFFREY CARTER, Administrative Law Judge. In this case, the General Counsel asserts that La Touraine LLC d/b/a Sofitel Chicago Magnificent Mile (Respondent) made unlawful statements to employees during the critical period before a representation election to induce them to vote against union representation, and unlawfully discriminated against bargaining unit employees by withholding a $1500 health care costs reimbursement payment that Respondent announced during the critical period before the representation election. As explained below, I have determined that Respondent violated the National Labor Relations Act as alleged.

STATEMENT OF THE CASE

This case was tried in Chicago, Illinois, on August 22, 2019, with the evidentiary record closed by an order issued on September 13, 2019, after the parties determined that they did not need to present any additional evidence.

Unite Here Local 1 (Union) filed the charge at issue here on February 21, 2019. On May 19, 2019, the General Counsel issued a complaint alleging that Respondent violated Section 8(a)(1) of the Act by: on multiple occasions in January 2019, promising bargaining unit employees improved health benefits if they voted against union representation; on about January 29, 2019, informing bargaining unit employees that they would only receive the same improved health care benefits as other employees, including reimbursement for health care costs, if they voted against representation by the Union; and on about January 30, 2019, informing bargaining unit employees that because of their activities on behalf of the Union they would not receive the same $1500 health care reimbursement payment and improved health benefits as other employees outside of the bargaining unit. The General Counsel also alleged that Respondent violated Section 8(a)(3) and (1) of the Act by, on about February 8, 2019, withholding a $1500

health care costs reimbursement payment from bargaining unit employees because they formed and/or joined the Union and engaged in concerted activities, and to discourage other employees from engaging in those activities. Respondent filed a timely answer denying the alleged violations in the complaint.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT[2]

I. JURISDICTION

Respondent, a Delaware limited liability company with an office and place of business in Chicago, Illinois, engages in the business of operating a hotel. Respondent admits, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act. Respondent also admits, and I find, that Respondent is subject to the jurisdiction of the National Labor Relations Board. (Jt. Exh. 1, par. 1; see also GC Exh. 1(c), par. 2 (complaint paragraph alleging that in 2018, Respondent derived gross revenues in excess of $500,000 and purchased and received goods valued in excess of $5000 directly from points outside the State of Illinois); GC Exh. 1(e), par. 2 (Respondent's answer, admitting that Respondent engaged in commerce within the meaning of the Act, and not denying the complaint allegations about revenue and interstate commerce).)

II. ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's Facility in 2018

On January 15, 2018, Matthew Blackmore began working as Respondent's general manager. Shortly after arriving, Blackmore noted that Respondent had been receiving low scores on its annual employee engagement surveys. Among other issues, Blackmore observed that employees were unhappy with less generous health insurance benefits that took effect in early 2018. (Tr. 96–97, 104–106, 109, 120–121; see also Tr. 128–130 (noting that human resources director Michelle Reed made similar observations after she began working for Respondent in August 2018).)

On or about December 20, 2018, Respondent received the results of its employee engagement survey for 2018. Although Respondent improved its survey score from the preceding year, a number of employee comments on the survey indicated that employees

[1] The transcripts and exhibits in this case generally are accurate. However, I hereby make the following corrections to the trial transcript: p. 37, l. 3: "3rd" should be "30"; p. 42, l. 18: "3rd" should be "30"; p. 63, l. 10: "fee" should be "few"; p. 65, l. 9: "object" should be "objection"; and p. 95, l. 5: "in" should be "at this."

[2] Although I have included several citations in this decision to highlight particular testimony or exhibits in the evidentiary record, I emphasize that my findings and conclusions are not based solely on those specific citations, but rather are based on my review and consideration of the entire record for this case.

continued to be unhappy with their health insurance benefits. (Tr. 108–109, 118–119, 125, 141–143, 147–149; R. Exh. 5.)

B. January 11, 2019 – the Union's Petition for an Election

On January 11, 2019, the Union filed a petition for an election to represent employees in the following appropriate bargaining unit:

> All full-time and regular part-time food & beverage employees including dishwashers, cooks, tournants, outlet servers, room service servers, banquet servers, banquet extras, banquet housemen, bartenders, barbacks, lounge attendants, hosts/hostesses, restaurant bus persons/runners, minibar, and pastry cooks employed by Respondent at its operations at 20 E. Chestnut Street, Chicago, Illinois; but excluding all other employees, valet employees, engineering employees, housekeeping employees, front desk department, managers, office clerical employees and guards, professional employees and supervisors as defined in the NLRA.

(GC Exh. 1(c), par. 5; GC Exh. 1(e), par. 5; Jt. Exh. 1, pars. 3, 5; Tr. 84, 98, 114, 120; see also R. Exh. 4 (listing job classifications in the bargaining unit).) Respondent has approximately 200 employees in all positions, with approximately 60–70 of those employees in bargaining unit positions. (Tr. 45, 83, 114.)

C. Ongoing Employee Concerns about Health Insurance

On January 19, 2019, an assistant manager in the housekeeping department emailed Blackmore and Reed to request a meeting for housekeeping employees to express their frustrations and concerns about health insurance benefits. Blackmore and Reed agreed and met with housekeeping department employees on January 24, 2019. (R. Exh. 1; Tr. 112, 115–116, 143–145.)

After hearing employees' concerns about health insurance in the January 24 meeting (along with the similar concerns that employees expressed in their responses to the December 20, 2018 survey), Respondent decided to make changes to health insurance benefits, including providing a $1500 payment to each nonbargaining unit employee to reimburse them for health care costs. Respondent planned to announce the forthcoming changes to health insurance benefits in a town hall meeting with employees scheduled for January 28. Blackmore admitted that the Union's petition for an election was a factor in the timing of Respondent's decision to provide the $1500 health care costs reimbursement payment to employees who were not in the bargaining unit. (Tr. 105–106, 121–124; GC Exh. 5.)

D. Discussions about the Upcoming Representation Election

After the Union filed its petition, Respondent's management was aware of the activity by the Union and some employees in seeking to win the representation election. (Jt. Exh. 1, par. 4.) Respondent, meanwhile, developed its own talking points to use when communicating with employees about the upcoming election. (Tr. 112–113, 134; R. Exhs. 2, 6.)

On various occasions in January (up to around January 31), director of rooms Volkan Pakis approached employee Endri Velo and attempted to convince Velo not to vote for the Union. In those conversations, Pakis asked Velo to give Respondent another chance, and stated that new benefits were going to come, including better health insurance since employees had been complaining about that issue. Velo generally responded that he would think about it (whether to vote for the Union). (Tr. 85–90, 92.)

E. January 28, 2019 – Respondent Announces New Health Insurance Benefits

On January 28, 2019, Blackmore distributed a letter to employees who were not in the bargaining unit. The letter stated as follows:

> Over the past year, you have graciously welcomed me as your leader and together we have embarked upon a journey towards making [Respondent] the best hotel in the city. As we worked through a lot of change last year, particularly with a number of new arrivals in our leadership team, we worked hard together to improve the most important pillar of a successful hotel: a fantastic, engaged work environment, where every ambassador is excited to come to work, is well supported and passionate to succeed.
>
> The results of the annual Ambassador Engagement Survey demonstrate the progress made and I am very excited to tell you the Engagement Score increased 19 points, from 55 points in 2017 to 74 in 2018. While we have made significant progress, there is much work left to do and the overwhelming comment communicated in the survey is a clear frustration with our medical insurance plan.
>
> **I am pleased to announce that you have been heard and changes are happening! There are two elements to this change:**
>
> **Changes to the Medical Insurance Plan by June 1st**
>
> February/March – Forums held where you can share your feedback and suggestions
> April – The new plan will be announced
> June 1st – New benefit offering available. You will have the opportunity to move to the new plan even if you declined insurance previously
>
> **$1500 Payment for Medical Costs Support**
>
> In order to support you in covering your medical expenses prior to the implementation of the new medical insurance plan, we are issuing a payment to each of you for $1500 after taxes.
> This payment will be automatically included on your next paycheck (February 8th)
>
> Thank you for your patience while we worked on addressing this very important issue. On behalf of the leadership team, we are passionate and committed to making

> [Respondent] an amazing place to work. You will always continue to be heard and I look forward to our many future successes together!
>
> Merci and thank you for all your support.

(GC Exh. 2; Tr. 23; see also Tr. 73–74 (explaining that Respondent calls its employees "ambassadors").) Respondent did not offer the $1500 health care costs reimbursement payment to any employees in the bargaining unit. At trial, Respondent acknowledged that it could have announced the $1500 payment and changes to medical insurance at any time, including after February 1, 2019 (the date of the representation election). (Tr. 123–124.)

F. January 29–31, 2019 – Meetings with Employees

In the week of January 27, 2019, Respondent planned a series of meetings with employees. (See GC Exh. 5.) Three of those meetings are at issue here: a January 29 meeting intended only for banquet employees (banquet employees are in the bargaining unit); a January 30 town hall meeting; and a January 31 meeting intended only for bargaining unit employees.

1. January 29 meeting with banquet employees

On about January 29, 2019, Blackmore met with banquet employees "to communicate the messaging re: changes to benefits for everyone else." (GC Exh. 5.) Blackmore advised the banquet employees at the meeting that things would work better without a union. On the topic of health care, Blackmore noted that Respondent was going to offer a new health care package but could not extend that package to banquet employees because their benefits became frozen when food and beverage department employees chose to move forward with joining the Union. (Tr. 49–53.)

2. January 30 town hall meeting

On about January 30, 2019, Respondent convened a town hall meeting that was open to all employees.[3] Using a slideshow presentation and accompanying notes, Blackmore began the

[3] To the extent that Blackmore implied that food and beverage department employees were excluded from general town hall meetings such as the January 30 meeting, I do not credit that testimony. (See Tr. 100, 103–104 (asserting that GC Exh. 3 was presented specifically to employees outside of the food and beverage department).) First, multiple employees from the food and beverage department testified that they and their coworkers from the department attended the January 30 town hall meeting along with employees from other departments, and their testimony was not directly rebutted. (Tr. 31–32, 55–56, 58–59, 73–75.) Second, Blackmore's slideshow presentation and notes for the general townhall meeting include messaging aimed at food and beverage department employees who would be voting in the union election, as well as messaging aimed at employees in other departments. (See, e.g., GC Exh. 3, pp. 14–15.) And third, there is no evidence that Respondent took any measures to exclude food and beverage department employees from the January 30 town hall meeting (in contrast to the January 31 meeting, which Respondent intentionally limited to food and beverage department employees).

On a somewhat related point, I note that I have given little weight to the fact that some employee witnesses agreed during cross examination that GC Exh. 4 (instead of GC Exh. 3) was the slideshow presentation that Blackmore used on January 30. (Tr. 40–42, 44, 60–64, 78–80.) The two slideshows are

meeting by describing the progress that the hotel had made since early 2018, and highlighting the additional investments that Respondent planned to make at the hotel in 2019. (GC Exh. 3, pp. 4–7; Tr. 30–31, 42, 55, 65, 72–76, 80–81; see also GC Exh. 5.)

Next, Blackmore described the upcoming union election. Blackmore noted that if food and beverage department employees voted to be represented by the union, then: potentially long negotiations would begin; all compensation and benefits would be frozen until the collective-bargaining process was completed; employees would have to begin paying union dues; and Respondent would lose the flexibility to address situations specific to individual employees. Blackmore noted the improved score that Respondent received in the 2018 employee engagement survey and asked food and beverage employees to give him a chance because he would fight for what is fair, just and right. Regarding employees who would not be voting in the election, Blackmore stated that they would see that he would address the concerns that came up in the survey. (GC Exh. 3, pp. 8–15; Tr. 36, 57, 60, 76.)

Last, Blackmore highlighted the forthcoming changes to health care benefits, including a revised medical insurance plan that would be available by June 1, and a $1500 health care costs reimbursement payment that each employee outside of the food and beverage department would see in their next paycheck. Blackmore explained that due to federal law restrictions he could not change the compensation and benefits of any employees petitioning to be represented by the union. When food and beverage department employee Jimmy Barjami asked if employees in his department would be receiving the $1500 payment, Blackmore said "no" because everything for food and beverage employees was frozen due to the union petition and election.[4] (GC Exh. 3, p. 16; Tr. 34–35, 57–59, 77, 103–104.)

3. January 31 meeting with food and beverage department employees

On about January 31, 2019, Respondent convened a meeting intended only for employees in the food and beverage department. Using a slideshow presentation prepared for the food and beverage department, Blackmore described the progress that the hotel had made since early 2018, and highlighted the additional investments that Respondent planned to make at the hotel in 2019, particularly in the food and beverage department. (GC Exh. 4, pp. 4–8 (slideshow presentation and talking points that Blackmore used for the meeting); Tr. 99, 131–132, 149, 152–153; see also Tr. 101–102, 133 (explaining that Respondent attempted to ensure that only employees from the food and beverage department attended the January 31 meeting).)

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different but have several similar slides and notes, such that it is understandable that a lay witness might mistake one slideshow for the other. I have given more weight to the fact that multiple food and beverage employees testified that they attended the January 30 meeting with employees from other departments and heard Blackmore discuss the new health insurance benefits (consistent with GC Exh. 3), and that Respondent's witnesses did not directly refute that testimony.

[4] Witness Edgar Irizarry testified that Blackmore also said (in response to Barjami's question) that food and beverage employees could receive the health care costs reimbursement payment and the new health insurance if the union lost the election. (Tr. 57–59.) Blackmore, meanwhile, denied promising food and beverage department employees that they would receive the $1500 payment if they voted against the union (or, conversely, that employees would not receive the payment if they voted for the union). (Tr. 102, 116–117.) I found both witnesses to be equally credible on this narrow point, and thus have credited Blackmore's limited denial that he made an explicit "if-then" promise.

Turning to the topic of employee engagement, Blackmore noted that Respondent's scores on the annual employee engagement survey improved but recognized that employee benefits were a major issue. Blackmore asked employees to give him a chance to address employee concerns without a union and described (as he did in the January 30 meeting) what could happen if employees voted to bring in a union, including: lengthy negotiations; employees having to pay expensive union dues; compensation and benefits frozen during bargaining; and Respondent having less flexibility to handle employee concerns on an individual basis. Blackmore also stated that employees faced a choice between voting "yes" to bring in the Union and have a slow change to their benefits (due to lengthy negotiations with the Union with no idea of the end result), or voting "no" and working directly with Respondent which would have the right to make changes to benefits as fast as it wanted. (GC Exh. 4, pp. 9–14, 16.1, 17–18.)[5]

In support of his request that employees give him a chance, Blackmore pointed to the positive changes that took place in 2018, and asserted that Respondent had an exciting future. Blackmore also mentioned that the employees at the meeting "likely heard already that positive changes have happened in the last few days where changes were made to everyone not covered by [the] election process," including "changes [Respondent was] rolling out to fix the benefits in this hotel." (GC Exh. 4, pp. 16.1–16.2; see also Tr. 107–108, 132 (noting that Blackmore did not specifically mention the $1500 health care costs reimbursement payment in this meeting).) Blackmore concluded the meeting by assuring employees that they could not be retaliated against for voting either way in the election, and by asking the employees to vote "no" in the election. (GC Exh. 4, pp. 19–22.)

G. February 1, 2019 – Representation Election

On February 1, 2019, employees in the food and beverage department voted in a representation election. The Union prevailed in the election and subsequently Respondent and the Union began bargaining over the terms of an initial collective-bargaining agreement (including terms for health insurance benefits). At the time of trial, the parties had held five bargaining sessions and bargaining was still in progress. (Jt. Exh. 1, pars. 3, 6, 8; Tr. 29–30, 47, 72, 84–85, 117, 145–146.)

H. February 8, 2019 – Respondent Makes $1500 Health Care Costs Reimbursement Payment to Employees who are not in the Bargaining Unit

On February 8, 2019, Respondent provided a $1500 health care costs reimbursement payment to each employee (including managers) who was not part of the food and beverage department bargaining unit. Employees in the food and beverage department bargaining unit did not receive the $1500 health care costs reimbursement payment. (Jt. Exh. 1, par. 7; Tr. 37, 59, 78.)

[5] GC Exh. 4 has two pages marked as page 16. For ease of reference, I refer to those pages as 16.1 and 16.2.

DISCUSSION AND ANALYSIS

A. Credibility Findings

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. Credibility findings need not be all-or-nothing propositions — indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 860 (2014) (noting that an administrative law judge may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). To the extent that credibility issues arose in this case, I have stated my credibility findings in the Findings of Fact above.

B. Did Respondent Make any Statements about Health Care Benefits that Violated Section 8(a)(1) of the Act?

1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by: (a) on various dates in January 2019, promising (through supervisor Volkan Pakis) bargaining unit employees improved health benefits if they voted against union representation; (b) on about January 29, 2019, informing (through general manager Matthew Blackmore) bargaining unit employees that they would only receive the same improved health care benefits as other employees, including reimbursement for health care costs, if they voted against union representation; and (c) on about January 30, 2019, informing (through Blackmore) bargaining unit employees that, because of their activities on behalf of the Union, they would not receive the same $1500 health care costs reimbursement payment and improved health benefits as other employees outside of the unit.

2. Applicable legal standard

Section 8(a)(1) of the Act makes it unlawful for an employer (via statements, conduct, or adverse employment action such as discipline or discharge) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. The test for evaluating whether an employer's conduct or statements violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain or coerce union or protected activities. *Farm Fresh Company, Target One, LLC*, 361 NLRB at 860; *Yoshi's Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1339 fn. 3 (2000).

The Board has provided additional guidance for specific types of statements and conduct that can arise in connection with an ongoing union organizing campaign. As a general matter, employers may permissibly engage in legitimate campaign propaganda about the merits of union membership, as long as the campaign propaganda is not linked to comments that cross the line set by Section 8(a)(1) and become coercive (from the objective standpoint of the employees,

over whom the employer has a measure of economic power). See *Mesker Door, Inc.*, 357 NLRB 591, 595 (2011); Section 8(c) of the Act (stating that the "expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act . . . , if such expression contains no threat of reprisal or force or promise of benefit").

An employer may not promise or grant benefits to employees for the purpose of discouraging union support during a union organizing campaign. *Manor Care of Easton, PA*, 356 NLRB 202, 202 fn. 3, 222 (2010), enfd. 661 F.3d 1139 (D.C. Cir. 2011). Notably, while the employer's motive is typically irrelevant to the merits of 8(a)(1) allegations, employer motive is relevant to promises or conferral of benefits, as the employer's motive for conferring a benefit during an organizing campaign must be to interfere with or influence the union organizing. Thus, the Board must determine whether the record evidence as a whole, including any proffered legitimate reason for the benefit, supports an inference that the employer's benefit offer was motivated by an unlawful purpose to coerce or interfere with employees' protected union activities. *Network Dynamics Cabling*, 351 NLRB 1423, 1424 (2007) (citing *NLRB v. Exchange Parts*, 375 U.S. 405 (1964)); see also *Mercy Hospital Mercy Southwest Hospital*, 338 NLRB 545, 545 (2002) (noting that an employer cannot time the announcement of a benefit in order to discourage union support during a union organizing campaign, and that the Board may separately scrutinize the timing of the benefit announcement to determine its lawfulness); *Yale New Haven Hospital*, 309 NLRB 363, 366 (1992) (noting that an employer may establish a legitimate business reason for promising or providing benefits to employees by showing that the benefits were granted in accordance with a preexisting established program).

3. Analysis

In December 2018, and January 2019, Respondent learned that employees were unhappy with their health insurance benefits. Respondent decided to address that problem (albeit only for employees who were not in the bargaining unit) by providing a $1500 payment to employees to reimburse them for health insurance costs, and by planning to make changes to the health insurance program that would take effect in June 2019. Notably, the January 11, 2019 union election petition was a factor in the timing of Respondent's decision to provide these new benefits. (FOF, Section II(A)–(C); see also FOF, Section II(E) (noting that Respondent announced the new benefits on January 28, 2019).) Subsequently, Respondent used the new benefits in its messaging to food and beverage department employees by making the following statements aimed at encouraging employees to vote "no" in the election:

(a) on various dates in January 2019, attempting to convince employee Endri Velo not to vote for the Union, in part by telling him (through Pakis) that new benefits are going to come, including better health insurance since employees had been complaining about that issue;

(b) on about January 29, 2019, telling banquet employees (through Blackmore) that Respondent was going to offer a new health care package but could not extend the package to banquet employees because their benefits became frozen when food and beverage department employees chose to move forward with joining the Union;

(c) on about January 30, 2019, telling bargaining unit employees and other employees (through Blackmore) that Respondent would be implementing a revised medical insurance plan and making a $1500 payment to each employee to reimburse them for health care costs, but adding that food and beverage department employees could not receive those benefits because their benefits were frozen due to their petition to be represented by the Union and the upcoming election.

(FOF, Section II(D), (F)(1)–(2); see also FOF, Section II(F)(3) (indicating that, in a January 31, 2019 meeting with food and beverage department employees, Respondent referenced the positive changes that it recently made for employees who were not in the proposed bargaining unit).)

Based on the evidentiary record, I find that all three of Respondent's statements noted above were promises of benefits that were motivated by an unlawful purpose to coerce or interfere with employees' protected union activities. While health care benefits were certainly a point of concern for both Respondent and its employees, there was no legitimate reason for Respondent to announce its new healthcare benefits on January 28, 2019, mere days before the February 1, 2019 union election, nor was there a legitimate reason to exclude only bargaining unit employees from receiving the new benefits.[6] Indeed, the timing of Respondent's announcement of its new health care package was entirely in Respondent's control, and Respondent admitted that the upcoming representation election was a factor in Respondent's decision to announce the benefits on January 28. Moreover, through its statements to bargaining unit employees, Respondent communicated an implicit message: vote against the Union and enjoy the benefits that Respondent granted to all other employees or vote for the Union and take your chances with whatever might result from bargaining between Respondent and the Union. That message would have a reasonable tendency to coerce employees in the exercise of their Section 7 rights, and the evidentiary record shows that Respondent intended to communicate that message. See *Manor Care of Easton, PA*, 356 NLRB at 222–223 (finding that wage increases and bonuses made during a union organizing campaign were unlawful and not supported by any legitimate business reason, and noting that employees receiving the increases and bonuses would reasonably view them as an attempt to interfere with employees' choice in the union campaign); *E.L.C. Electric, Inc.*, 344 NLRB 1200, 1201 (2005) (finding that the employer violated Section 8(a)(1) of the Act by, in the critical period before a representation election, telling employees that it was actively seeking to improve health insurance benefits, because that statement was an unlawful promise to improve benefits and the employer offered no plausible reason, other than the pending election, for the timing of its promise). Accordingly, I find that Respondent violated Section 8(a)(1) of the Act by making each of the three statements in January 2019, that I have identified above.

[6] As explained more fully below, although Respondent expressed concern that it might violate the Act if it granted benefits to the bargaining unit before the election, that concern did not qualify as a legitimate reason to announce the benefits before the election or to exclude the bargaining unit from the benefits. See Discussion and Analysis, Section C(3), infra (noting that the Board, in *Woodcrest Health Care Center*, 366 NLRB No. 70, slip op. at 5–6 (2018), enfd. 779 Fed.Appx. 908 (3d Cir. 2019), rejected a similar rationale for excluding bargaining unit employees from a promised benefit because there were other lawful options available for the employer to avoid influencing the election).

C. Did Respondent Violate Section 8(a)(3) and (1) of the Act by Withholding the Health Care Costs Reimbursement Payment from Bargaining Unit Employees?

1. Complaint allegations

The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) of the Act by, on about February 8, 2019, withholding a $1500 health care costs reimbursement payment from bargaining unit employees because they formed and/or joined the Union and engaged in concerted activities, and to discourage employees from engaging in those activities.

2. Applicable legal standard

As a general rule, an employer's legal duty in deciding whether to grant benefits while a union representation petition is pending is to decide that question precisely as it would if the union were not on the scene. In determining whether a grant of benefits is objectionable, the Board has drawn the inference that benefits that are granted during the critical period are coercive, but it has allowed the employer to rebut that inference by coming forward with an explanation, other than a pending election, for the timing of the grant or announcement of such benefits. Further, while an employer is not permitted to tell employees that it is withholding benefits because of a pending election, it may, in order to avoid creating the appearance of interfering with the election, tell employees that implementation of expected benefits will be deferred until after the election regardless of the outcome. *Noah's Bay Area Bagels, LLC*, 331 NLRB 188, 189 (2000).

3. Analysis

The evidentiary record shows that between January 28 and 31, 2019, Respondent informed employees (including bargaining unit employees) that it would be making a $1500 health care costs reimbursement payment to all employees except for employees in the food and beverage department bargaining unit. As its rationale for that decision, Respondent told bargaining unit employees that their benefits were frozen due to the January 11, 2019 union petition and upcoming election. After the election on February 1, 2019, Respondent made the $1500 health care costs reimbursement payment to all employees except for employees in the bargaining unit. (FOF, Section II(B), (E)–(H).)

Based on the facts established in the evidentiary record, I find that Respondent unlawfully discriminated against bargaining unit employees when it excluded them from receiving the $1500 health care reimbursement payment that Respondent paid to all other employees on February 8, 2019. While Respondent's desire to improve employee health care benefits is understandable, Respondent did not meet its obligation to address that issue as if the Union were not in the picture. Instead, motivated in part by the upcoming representation election, Respondent announced its plans to provide the $1500 payment and referred to the new benefit in its messaging to bargaining unit employees about why they should vote no in the upcoming election. Further, once the election was over, Respondent proceeded to implement the $1500 payment for all employees who were not in the bargaining unit, thereby making the bargaining unit employees' union activities the precise reason that Respondent denied them the $1500 payment. By excluding bargaining unit employees from the $1500 payment because of

their union activities, Respondent violated Section 8(a)(3) and (1) of the Act. See *Care One at Madison Avenue*, 361 NLRB 1462, 1462, 1474–1475 (2014) (finding that the employer violated Section 8(a)(3) and (1) of the Act when, shortly before a representation election, it announced and implemented a reduction in healthcare premiums and copays for all employees except those who were eligible to vote in the election), enfd. 832 F.3d 351 (D.C. Cir. 2016); *Noah's Bay Area Bagels, LLC*, 331 NLRB at 190–191 (same, where during the critical period before a representation election the employer excluded bargaining unit employees from having more desirable health care benefits restored).

The result that I have reached here does not change if I apply the legal standard that the Board used (at the direction of the United States Court of Appeals for the Third Circuit) in *Woodcrest Health Care Center*, 366 NLRB No. 70, slip op. at 1–3 (2018) (applying the legal standard in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967)), enfd. 779 Fed.Appx. 908 (3d Cir. 2019)). In describing the framework in *Great Dane*, the Board observed that some conduct is so inherently destructive of employees' interests that it may be deemed proscribed without need for proof of an underlying improper motive. The Board added, however, that when the resulting harm to employee rights is comparatively slight, an antiunion motivation must be proved if the employer has come forward with evidence of a substantial and legitimate business justification for its conduct. In either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that it was motivated by legitimate objectives since proof of motivation is most accessible to the employer. *Woodcrest Health Care Center*, 366 NLRB No. 70, slip op. at 3.

As in *Woodcrest*, Respondent's decision to withhold the $1500 health care costs reimbursement payment from bargaining unit employees while announcing an intent to grant those payments to all other employees qualifies as discriminatory conduct which could have adversely affected employee rights to some extent. Bargaining unit employees were aware that they were being denied the $1500 payment (see, e.g., FOF, Section II(F)(2)), and the foreseeable effect of Respondent's conduct was to discourage employees from exercising their Section 7 rights. See *Woodcrest Health Care Center*, 366 NLRB No. 70, slip op. at 4.

Respondent, meanwhile, did not meet its burden of showing that its conduct was motivated by legitimate business objectives. In this case, Respondent has asserted that it excluded bargaining unit members from the $1500 payment because Respondent wanted to avoid impacting the election or exposing itself to unfair labor practices charges. As the Board explained in *Woodcrest*, however, Respondent could have avoided influencing the election by granting the $1500 payment to all employees (including bargaining unit employees), or by deferring announcing the $1500 payment until after the election. Instead of choosing one of those options, Respondent: announced the $1500 payment for all employees except bargaining unit employees; offered no assurances to bargaining unit employees that they would receive the payment after the election and regardless of the outcome; and implicitly referred to the new benefit when communicating with bargaining unit employees about why they should vote no in the election. Respondent also admitted that the upcoming union election was a factor in the timing of its announcement of the $1500 payment. Under those circumstances, Respondent did not demonstrate that it was motivated by legitimate objectives, and thus my finding that Respondent violated Section 8(a)(3) and (1) of the Act would stand under the standard that the

Board applied in *Woodcrest*.[7] See *Woodcrest Health Care Center*, 366 NLRB No. 70, slip op. at 5–6.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By, on various dates in January 2019, attempting to convince an employee not to vote for the Union, in part by telling him that new benefits are going to come, including better health insurance, Respondent violated Section 8(a)(1) of the Act.

4. By, on about January 29, 2019, telling bargaining unit employees that Respondent was going to offer a new health care package but could not extend the package to bargaining unit employees because their benefits became frozen when they chose to move forward with joining the Union, Respondent violated Section 8(a)(1) of the Act.

5. By, on about January 30, 2019, telling bargaining unit employees and other employees that Respondent would be implementing a revised medical insurance plan and making a $1500 payment to each employee to reimburse them for health care costs, but stating that bargaining unit employees cannot receive those benefits because their benefits were frozen due to their

[7] I add that I would also find a violation if I applied the legal standard generally set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The General Counsel made an initial showing of discrimination by showing that: the bargaining unit employees engaged in union activity; Respondent was aware of that activity (see FOF, Section II(D)); and union animus (the explicit exclusion of bargaining unit employees from the $1500 payment, as well as the unlawful statements that Respondent made to employees about the new benefits to induce employees to vote against the Union in the election). For the reasons stated in this section, Respondent did not prove, as an affirmative defense, that it would have taken the same action even in the absence of the bargaining unit employees' union activities. Accordingly, I would find (under *Wright Line*) that the General Counsel demonstrated that Respondent discriminated against bargaining unit employees by excluding them from the $1500 health care costs reimbursement payment.

In this connection, I note that the decision in *Arc Bridges, Inc. v. NLRB*, 861 F.3d 193 (D.C. Cir. 2017) is distinguishable. (See R. Posttrial Br. at 20–22 (relying on *Arc Bridges*).) In *Arc Bridges*, the Court held that substantial evidence did not support the Board's finding that the employer had an unlawful motivation when it gave a wage increase only to nonunion employees. The employer's decision, however, did not occur during a union organizing campaign, and the Court found that the Board did not adequately explain why the employer's proffered justifications for the wage increase were indicative of union animus (instead of a reasonable bargaining strategy and a rational business decision under the circumstances). 891 F.3d at 197–200. No such shortcomings are present here – as explained above, the evidentiary record demonstrates that Respondent did not have a legitimate business objective for announcing, during the critical period before the representation election, that bargaining unit employees would be excluded from the $1500 health care costs reimbursement payment, nor did Respondent have a legitimate business objective for subsequently withholding the $1500 payment from bargaining unit employees.

petition to be represented by the Union and the upcoming election, Respondent violated Section 8(a)(1) of the Act.

6. By, on about February 8, 2019, withholding a $1500 health care costs reimbursement payment from bargaining unit employees because they formed and/or joined the Union and engaged in concerted activities, and to discourage employees from engaging in those activities, Respondent violated Section 8(a)(3) and (1) of the Act.

7. The unfair labor practices stated in conclusions of law 3–6, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent must make its employees whole for any loss of earnings and other benefits that resulted from its unlawful decision to withhold the $1500 health care cost reimbursement payment from bargaining unit employees.[8] Backpay for this violation shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB 101 (2014), Respondent shall compensate all bargaining unit employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and, in accordance with *AdvoServ of New Jersey, Inc.,* 363 NLRB No. 143 (2016), Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 13 a report allocating backpay to the appropriate calendar year(s). The Regional Director will then assume responsibility for transmitting the report to the Social Security Administration at the appropriate time and in the appropriate manner.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

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[8] I am not persuaded by Respondent's argument that requiring it to make the $1500 payment to bargaining unit employees would be akin to compelling Respondent to agree to a particular substantive contract provision, and that the parties should be permitted to simply address the issue as part of their ongoing bargaining for an initial collective-bargaining agreement. (See R. Posttrial Br. at 24–26.) "From the earliest days of the Act, a make-whole remedy for employees injured by unlawful conduct has been a fundamental element of the Board's remedial approach." *Goya Foods of Florida*, 356 NLRB 1461, 1462 (2011). I find no basis to depart from that principle here, particularly where Respondent promised to make the $1500 payment (to employees outside of the bargaining unit) before the representation election and thus before Respondent had an obligation to bargain with the Union.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

Respondent, La Touraine LLC d/b/a Sofitel Chicago Magnificent Mile, Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Attempting to convince employees not to vote for the Union, in part by telling them that new benefits are going to come, including better health insurance.

(b) Telling employees that Respondent was going to offer a new health care package but could not extend the package to bargaining unit employees because their benefits became frozen when they chose to move forward with joining the Union.

(c) Telling bargaining unit employees and other employees that Respondent would be implementing a revised medical insurance plan and making a $1500 payment to each employee to reimburse them for health care costs, but stating that bargaining unit employees cannot receive those benefits because their benefits were frozen due to their petition to be represented by the Union and the upcoming election.

(d) Withholding a $1500 health care costs reimbursement payment from bargaining unit employees because they formed and/or joined the Union and engaged in concerted activities, and to discourage employees from engaging in those activities.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole bargaining unit employees for any loss of earnings and other benefits suffered as a result of Respondent's unlawful and discriminatory decision to withhold the $1500 health care costs reimbursement payment from bargaining unit employees, in the manner set forth in the remedy section of this decision.

(b) Compensate bargaining unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 13, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s).

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Chicago, Illinois, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facilities involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Respondent at any time since January 11, 2019.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C., November 15, 2019.

Geoffrey Carter
Administrative Law Judge

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT attempt to convince employees not to vote for the Union, in part by telling them that new benefits are going to come, including better health insurance.

WE WILL NOT tell employees that we are going to offer a new health care package but cannot not extend the package to bargaining unit employees because their benefits became frozen when they chose to move forward with joining the Union.

WE WILL NOT tell bargaining unit employees and other employees that we will be implementing a revised medical insurance plan and making a $1500 payment to each employee to reimburse them for health care costs, but state that bargaining unit employees cannot receive those benefits because their benefits were frozen due to their petition to be represented by the Union and the upcoming election.

WE WILL NOT withhold a $1500 health care costs reimbursement payment from bargaining unit employees because they formed and/or joined the Union and engaged in concerted activities, and to discourage employees from engaging in those activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make bargaining unit employees whole for any and all loss of wages and other benefits incurred as a result of our unlawful and discriminatory decision to withhold the $1500 health care costs reimbursement payment from bargaining unit employees.

WE WILL compensate bargaining unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 13, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s).

LA TOURAINE LLC d/b/a SOFITEL CHICAGO MAGNIFICENT MILE

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

Dirksen Federal Building, 219 South Dearborn Street, Room 808, Chicago, IL 60604-1443
(312) 353-9158, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/13–CA–236423 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (312) 353-7170.